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June 21, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

JUN 21 2005

Re: **NBC Universal, Inc.**
Ex Parte Communication
MB Docket 04-75

Federal Communications Commission
Office of Secretary

Dear Madam Secretary:

Max Media of Montana, LLC, and related entities have continued to attempt to drag the Commission into the NBC Network's private business decision not to renew its affiliation with Television Broadcast Station KTGF, Great Falls, Montana (the "Station").¹ In response to numerous recent Max Media filings, and a recent informational request by Commission Staff, the NBC Network hereby supplements its prior filings with the following additional information:

- NBC Network has entered into a network affiliation agreement with Low Power Television Station KBGF-LP, Great Falls, Montana ("KBGF"), effective July 1, 2005; accordingly, at no time will the community of Great Falls, Montana, lack an NBC Network affiliate;
- Contrary to the self-serving assertions of Max Media, the Station's own conduct repeatedly called into question whether NBC Network should continue to affiliate with the Station well prior to NBC Network's decision not to renew the Station's affiliation, including that:
 - The Station had terminated local news coverage;
 - The Station's licensee had "clipped" network advertisements and replaced such advertisements with local station spots without required notice to the NBC Network; and
 - The Station was receiving hundreds of thousands of dollars in annual affiliate compensation with little apparent benefit to the Network.

¹ A recent series of *ex parte* communications has been submitted by a group of parties with related interests, including the Station's former licensee, Max Media of Montana, LLC, the Station's new licensee, Destiny Licenses, LLC ("Destiny"), and other parties related to these entities (collectively with Destiny and Max Media of Montana, LLC, "Max Media").

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For approximately four years, Max Media has been aware of an April 1999 communication that Max Media claims is the basis for this proceeding. Yet, despite Max Media's recent flurry of filings, there remains no evidence that any station had any understanding with the NBC Network that, in the words of the Commission's Rules, "prevents or hinders another broadcast station located in a different community from broadcasting any" NBC Network program. Specifically, the Station itself has not been blocked from airing any NBC program because of an "understanding" with a television outlet assigned to a community other than Great Falls. Indeed, at all times during the relevant period, a station assigned to Great Falls, Montana, will be an NBC affiliate: until July 1, 2005, the Station itself remains affiliated with NBC Network; as of July 1, 2005, KBGF, which also is assigned to Great Falls, will become an NBC Network affiliate. Because there remains no evidence of any violation of the Commission's Rules, this matter should be promptly denied or dismissed with prejudice.

**FCC Rules Do Not Subject Private Network Business Decisions
to Intrusive Government Intervention**

Section 73.658(b) of the Commission's Rules (the "Rule") has a very limited scope and purpose: to facilitate an opportunity for competition for a network affiliation among stations assigned to a particular community. The Rule, by its plain terms, neither "assure[s] any station of network programming" nor presumes to extend Commission jurisdiction over television broadcast networks.² The Rule also does not compel a television network to affiliate with a specific station or any station in a particular community, instead leaving these critical private business decisions to the sole discretion of the relevant programming network.

In this instance, the NBC Network exercised its independent business discretion not to renew the Station's affiliation when that affiliation expired by its terms of the parties' affiliation agreement. According to the plain text of an April 1999 communication submitted into the record by Max Media, the NBC Network made that decision several years ago. In that correspondence, the NBC Network states unequivocally and unconditionally that "NBC had made a decision that it will not renew its affiliation agreement with Channel 16 in Great Falls, Montana."³

² See *Amendment of Section 3.658(b) of the Commission's Rules and Regulations*, Report and Order, 2 RR 1537, 1542 (1954).

³ In multiple other pleadings in this docket, NBC has further detailed how Max Media's reading of this correspondence consistently ignores what this correspondence actually says. Nowhere does the correspondence condition NBC's decision in which communities or with what station to affiliate on any action by any other party. The continued self-serving interpretations by Max Media and Destiny of communications alleged to relate to this matter do not rise to, and should not be confused with, evidence of any violation by Sunbelt. For example, Darnell Washington's recent hearsay allegations referencing inaccurate and out-of-context quotations from two NBC Network executives again do not indicate that there was any sort of agreement between NBC Network and Sunbelt that somehow limited NBC Network's independent business discretion to choose to affiliate with only a single station group in the Great Falls DMA. Even assuming, for argument's sake, that the nature of the parties' conversations were consistent with Washington's allegations, the Network is entirely within its rights to decide that it does not intend to

Max Media has not proffered any evidence to the contrary. At most, Max Media alleges that this unequivocal statement of NBC Network's intent offers "no basis to assume that [NBC Network's] decision was independent of [an] understanding with Sunbelt." ⁴ But, even assuming *arguendo* that such a self-serving assertion is true, this statement certainly offers "no basis to assume that" Sunbelt somehow had violated the Rule.

Max Media also claims to be unaware of any reason why the NBC Network would have decided not to renew the Station's affiliation as of April 1999, when the Station was owned by Continental Television Network, Inc. ("Continental"). Such reasons abound. First, as noted elsewhere in this proceeding, Continental, at that time, owned no other NBC affiliations. Although the NBC Network has entered into such "singleton affiliate" relationships, these relationships can prove burdensome when a singleton affiliate does not fulfill essential commitments of its agreements precisely because of the limited scope of the parties' relationship.

Second, NBC's affiliation with the Station was an outlier compared to other network practice in the area and was of relatively recent vintage. NBC had been affiliated with a station assigned to Helena, Montana since the 1950s. Prior to 1986, NBC had served the Great Falls market through this long-standing Helena affiliation and a partial affiliate in Great Falls that simultaneously served as an affiliate for at least one other major television broadcast network. It was not until 1986, when the Station became operational, that NBC had its own full-time, full-power affiliate in Great Falls. At that time, the twin full-power affiliations in the adjoining markets of Helena and Great Falls were an unproven major-network arrangement for the area: even today, other major networks continue to deliver their programming to Helena and Great Falls through a single full-power station assigned to one or the other community (supplemented, at least in some cases, by low-power stations). ⁵ Accordingly, NBC's determination by

affiliate with more than one station group in a particular market, especially a market the size of Great Falls. (Indeed, NBC Network's longstanding practice, with extraordinarily rare exceptions, has been to affiliate with but a single station group owner in a designated market area. This practice is not a result of contractual exclusivity provisions, but of NBC Network's sensible business judgment that such an approach strengthens the Network's ultimate distribution. NBC's overlapping affiliations in this market for a few years was but a temporary exception, not a considered change, to this longstanding practice.) In this context, any passing request to renew the NBC affiliation with the Station would be interpreted as a request to affiliate with the Station in lieu of - instead of in addition to - the Sunbelt station group. And the NBC Network was not going to breach its existing affiliation agreement with Sunbelt with respect to two stations elsewhere in the DMA or give the Station market exclusivity any more than it was going to breach its current affiliation agreement with the Station.

⁴ See Notice of Oral *Ex Parte* Presentations from Julian L. Shepard to Ms. Marlene Dortch, Secretary, at 2 (May 11, 2005).

⁵ See NBCU Reply Comments at n.2. According to industry references, CBS and ABC Networks affiliate with KRTV(TV) and KFBB-TV in Great Falls, Montana, respectively. Neither CBS nor ABC affiliates with a full-power stand-alone television station in the neighboring Helena DMA. Fox, UPN and Pax share a full-power affiliate in Great Falls - KLMN(TV), Great Falls, Montana - and, of those three networks, only Pax apparently has a full-power affiliate in the Helena DMA. See Broadcasting & Cable Yearbook 2005 at B-176, B-180.

April 1999 that it no longer needed full-time, full-power affiliates in both Helena and Great Falls was not just consistent with decades of NBC's own history in the area, but similar to the practices of other networks.

Third, NBC has multiple concerns with the Station's performance and Continental's demands during the course of its affiliation. In one of Max Media's recent *ex parte* filings, Max Media alleges, in response to a staff inquiry, that Continental, which owned the Station from 1986 into early 2001, had not received any notification from NBC regarding deficiencies in the station's performance as an NBC affiliate.⁶ Max Media is wrong.

For example, in March 1993, NBC was profoundly "disturbed to hear that [the Station] has found it necessary to close its news department."⁷ Faced with Continental's failure to deliver the local news, an NBC Network News Channel representative urged the Station to reconsider, noting the NBC Network's long-standing belief that local news "is the only thing that makes most stations unique, and that position may be the only one that offers long-range hope for survival."⁸

Two years later, in 1995, the NBC Network actually terminated the Station's affiliation agreement because of the Station's breach of contract, with the caveat that the Network might reconsider if Continental took prompt steps to effect an acceptable resolution. As described in the correspondence attached as Exhibit B, Continental had consistently covered network prime-time promotional material with the Station's own commercial material.⁹ Like the sudden cessation of local news, such conduct is very troubling. Moreover, the timing of the Station's action near the end of the Station's then-existing affiliation agreement posed substantial difficulty to the NBC Network in light of the business context at that time, when all network affiliation arrangements were unsettled by the advent of the Fox Network and other developing network opportunities. Ultimately, NBC decided to give the Station one more chance by canceling the 1995 termination and renewing the Station's affiliation through 2005, but the incident deepened NBC Network's trepidation that a continuing relationship with the Station was not proving to be good business.

Beyond these serious performance issues, NBC Network grew increasingly concerned with the Station's expected affiliate compensation. In 1999 alone, NBC Network recalls that it was obligated to pay the Station hundreds of thousands of dollars in affiliate compensation. Since 1999, the Station actually had demanded that affiliate compensation be increased. Together with the Network's other concerns, it was increasingly clear that such annual outlays did not make business sense for the Network.

⁶ See Notice of Oral *Ex Parte* Presentations from Julian L. Shepard to Ms. Marlene Dortch, Secretary, at Attachment (June 3, 2005).

⁷ See Letter to Ms. Penny L. Adkins, Corporate Vice President, KTGF-TV, from Bob Horner, NBC News Channel (dated March 30, 1993) (attached as Exhibit A).

⁸ See *id.*

⁹ See Exhibit B.

**The Rule Does Not Afford One Station Regulatory Leverage Against
Another Station Assigned to the Same Community**

The Rule is entirely neutral as to which, if any, of several stations assigned to a community becomes a network's affiliate. Under the Commission's Rules, that neutrality extends to low-power television stations, such as KBGF. As noted in prior filings in this matter, Section 74.780 of the Commission's Rules states that "Section 73.658-Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements" applies to "TV translator, low power TV and TV booster stations."¹⁰ Section 74.780's plain meaning follows directly from the 1982 Commission order that created the low-power television service:¹¹

In the interest of ensuring even-handed treatment of all network affiliates, full service or low power, we are requiring that any affiliation agreements between low power stations and networks will be subject to the same regulations as full service station affiliation agreements, see 73.658 and 73.3613 of the Commission's Rules.

Any conclusion to the contrary would cause low-power television network affiliates throughout the country to be blocked from the possibility of network affiliations by full-power stations, as there is no other rule separately protecting low-power stations from claims of over-the-air network exclusivity.

Max Media's recent *ex parte* on this topic does not address the clear application of the Rule to low-power television stations through the plain language of Section 74.780.¹² Moreover, Max Media presents no extraordinary circumstance that justifies its proposed rewriting of the Commission's Rules to advance Max Media's private business interests. For example, in terms of real people served, the change in the population projected to be served in and near Great Falls as a result of the change in Great Falls affiliation is hardly extraordinary. Even under Max Media's technical analysis, NBC's new Great Falls affiliate, KBGF, is projected to serve with a Grade A signal all but 10,865 persons of the projected population within the Station's Grade A contour -- without consideration of other NBC affiliates in Helena, Havre or Lewiston, Montana, that serve the Great Falls DMA.¹³ Given that the Commission has not presumed to dictate that a network must continue to affiliate with any station in a particular community or market, the difference

¹⁰ 47 C.F.R. § 74.780 (Broadcast regulations applicable to translators, low power, and booster stations.)

¹¹ See *Amendment of Section 3.658(b) of the Commission's Rules and Regulations*, Report and Order, 12 RR 1537, 1542 (1955). Unlike Section 74.780's reference to Section 73.3613, which expressly limits application of the rule to certain LPTV station filings, Section 74.780's reference to the Rule does not state any exceptions or limitations with respect to the Rule.

¹² See Notice of Oral *Ex Parte* Presentations from Julian L. Shepard to Ms. Marlene Dortch, Secretary, at Attachment (June 3, 2005) (the "June 3 *Ex Parte*").

¹³ See June 3 *Ex Parte* in Attachment. In an effort to enlarge the alleged disparity in population served to approximately 16,000 persons, the June 3 *Ex Parte* apparently compares KTGF's Longley-Rice analysis of its Grade B contour with a standard analysis of KBGF's Grade A contour.

between the two projected areas of service is hardly an extraordinary circumstance sufficient to justify Commission intervention.

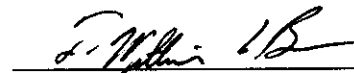
**As Max Media Has Failed to Demonstrate Any Actual or Imminent Violation of the Rule,
the Matter Should Be Moot**

The plain terms of the Rule underscore that this matter is moot. The Rule prohibits any broadcast station from entering into any understanding which "prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization." At no time in the relevant period has any broadcast station located in a different community been "prevent[ed]" or "hinder[ed]" from broadcasting a network program.¹⁴ Before July 1, 2005, the Station in fact has been the NBC network affiliate in Great Falls and has broadcasted NBC network programming pursuant to the parties' affiliation agreement. Following July 1, 2005, KBGF-LP, Great Falls, Montana, will become the NBC network affiliate in Great Falls. Accordingly, the Rule has not and is not about to be violated, and the matter should be dismissed as untimely.

* * * * *

For the foregoing reasons, the matter should be dismissed with prejudice or denied.

Respectfully submitted,



F. William LeBeau
Assistant Secretary & Senior Regulatory Counsel
NBC Universal, Inc.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-637-4535

cc: Catherine Bohigian, Media Legal Adviser to Chairman Martin
Matthew Brill, Media Legal Adviser to Commissioner Abernathy
Jordan Goldstein, Media Legal Adviser to Commissioner Copps
Rudy Brioché Media Legal Adviser to Commissioner Adelstein
Donna Gregg, Media Bureau Chief
Roy Stewart, Senior Deputy Media Bureau Chief
Robert Ratcliffe, Deputy Media Bureau Chief
Julian L. Shepard, Counsel to Max Media of Montana, LLC
Erwin G. Krasnow, Counsel to Destiny Licenses, LLC
Alan Campbell, Counsel to Sunbelt Communications Company

¹⁴ 47 C.F.R. 73.658(b).

EXHIBIT A

925 Wood Ridge C r Drive
Charlotte, NC 282
704 329-8701

Robert M. Horner
President



file

March 30, 1993

Ms. Penny L. Adkins
Corporate Vice President
KTGF-TV
118 Sixth Street South
Great Falls, MT 59405

Dear Penny,

We are disturbed to hear that KTGF has found it necessary to close its news department. We will cease collecting our News Channel payment at the end of March, even though the station is not complying with the termination provisions contained in our contract.

We are making this exception in the hopes that KTGF will eventually return to local news programming, and will again be a News Channel subscriber.

Please forgive a commercial for "news" from a life-long news person: With the incredible number of choices becoming available to the local viewer, local news is the only thing that makes most stations unique, and that position may be the only one that offers long-range hope for survival. Peter has explained the financial realities of the present to me, and I understand completely. I just would like to urge you to keep local news on your agenda.

In the meantime, we appreciate your offer of continued assistance. I am sure we will take you up on it.

Sincerely,

Bob Horner

Bob Horner

cc: Peter Flynn
Pier Mapes
Ralph Boral
Mike Golec

cc: *B. Fouch*
R. Niles
L. Alden

EXHIBIT B

3000 West Alameda Avenue
Burbank, CA 91523
818 840-4483

A Division of
National Broadcasting
Company Inc.

Bill Fouch
Vice President
Affiliate Relations - Entertainment
West Coast



BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 27, 1995

Mr. Jim Colla
President, Continental Television Network, Inc.
118 6th St. S
Great Falls, MT 59401

Dear Jim:

We have learned that KTGF-TV has consistently covered NBC Network promotion positions in primetime with local commercial material. Because of the serious nature of this allegation, we have recorded KTGF-TV's broadcast signal to verify those violations and found them to be true.

The clipping of the network signal was done without NBC's consent and is a material breach of our affiliation contract. Accordingly, NBC is hereby serving notice of termination of our affiliation contract. This termination is to take effect on August 1, 1995, unless a mutually acceptable resolution can be worked out in the intervening time. In any event, the insertion of all local material in NBC programming must cease immediately.

NBC reserves all of its rights and remedies in this matter.

Thank you.

Regards,

A handwritten signature in cursive script that reads "Bill Fouch".

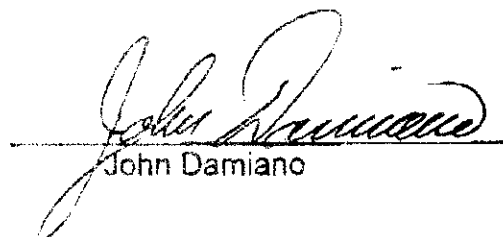
Bill Fouch

BF/kmg

cc: L. Alden ✓
N. Braun
B. Niles

DECLARATION

I, John Damiano, Executive Vice President, Affiliate Relations,
NBC Universal, Inc., under penalty of perjury, hereby declare that the foregoing
submission is true and accurate to the best of my personal knowledge and belief.



John Damiano

June 21, 2005